Tang Hooi Kheng & Anor v The Titular Roman Catholic Bishop of Penang

HIGH COURT (PENANG) — SUMMONS NO PA-22NCVC-187–11 OF 2018
AHMAD SHAHRIR JC
7 AUGUST 2019

Civil Procedure — Striking out — Application to strike out action — Defendant applied to strike out plaintiff's action — Whether defendant rightful deponent of affidavit — Whether action by plaintiffs not sustainable based on doctrine res judicata — Whether plaintiff's present claim premised on same facts and issues which already decided by the sessions court and High Court — Whether action should be struck out — Rules of Court 2012 O 18 r 19 (1)(a), (b), (c)

This was an application by the defendant ('encl 5') under O 18 r 19(1) of the Rules of Court 2012 ('the Rules') to strike out the plaintiff's writ of summons and statement of claim. The plaintiffs were husband and wife who operated their restaurant business at an annexe building measuring 2,160 sqft built at their own cost and expense as an extension to an existing canteen owned by the defendant on a piece of land held under Lot 12741, GM 1696, Mukim 15, Province Wellesley Central, Penang. The annexe building was built with the consent of the defendant and the plaintiffs paid a monthly rental of RM4,000 since 16 June 2010. Upon completion of the annexe building, the defendant refused to execute a written tenancy agreement with the plaintiffs for its rental. The defendant issued a notice of intention to terminate the tenancy of the annexe building with effect from 31 December 2018. The defendant then commenced an action against the first plaintiff at the sessions court vide Summons No A52NCC-75–06 of 2016 claiming, inter alia, for the delivery of vacant possession of the annexe building and the canteen. The sessions court allowed the defendant's claim and dismissed the plaintiff's counterclaim. The first plaintiff's appeal was then dismissed by High Court. On 7 February 2018, the first plaintiff appealed to the Court of Appeal against the decision of the High Court, however the plaintiff later filed a notice to withdraw the appeal. In the present action, the plaintiffs pleaded: (a) the annexe building was built with the consent of the defendant to cater for the increasing needs of the plaintiffs' customers and that the defendant had made representations that the plaintiffs could continue to rent the annexe building for a further period of 25 years up to the end of the year 2025 but the defendant reneged on its promise; (b) the annexe building enhanced the value of the defendant's land, ie it was valued at RM1.4m by a licensed valuer; (c) therefore, the defendant should not be allowed to unjustly enrich itself and must reimburse the plaintiffs for an

amount equivalent to the value of the annexe building. The defendant contended that the present action by the plaintiffs was not sustainable on the basis of res judicata because the plaintiff's present claim was premised on the same facts and issues which already decided by the sessions court and High Court. The plaintiff contended that the defendant was the Titular Roman Catholic Bishop of Penang and not the deponent of the affidavit. The plaintiffs further contended that the claim was for the loss of their right and interest in the annexe building at the market value and the cause of action was pertaining to the issue of unjust enrichment under s 71 of the Contracts Act 1950 and it was not an issue in the previous action.

Held, allowing the defendant's application with costs of RM3,000 subject to allocator:

(1) As the successor in office of the Right Reverend Monseigneur Francis Chan, the Right Reverend Sebastian Francis a/l MJ Francis was by law, the defendant itself, namely the body corporate. Section 4 of the Roman Catholic Bishops (Incorporation) Act 1957 conferred upon the defendant corporate sole and the legal personality as the corporation. As such, the defendant must be the rightful deponent of the affidavits filed for the defendant. The arguments by the plaintiff were clearly without merit and was made in complete disregard of the relevant incorporating statute (see para 13).

(2) It was found that the present action was grounded on the same set of facts as that of the previous action whereby a decision on merits was made by the sessions court and affirmed by the High Court. The first plaintiff in the previous action had discontinued her appeal to Court of Appeal as evidenced by the notice to withdraw the appeal. In that context, it must be taken that the previous action had been disposed of with finality (see para 17).

(3) The plaintiff's claim in the present action was related to issues which were decided on their merits in the previous action. The High Court in affirming the decision of the sessions court in the previous action mentioned that unjust enrichment was not part of the issues to be tried. However, the doctrine of res judicata applied to the whole issues which should be the subject matter of litigation between the parties in the previous action. The plaintiffs' action was clearly barred by res judicata and the plaintiffs' claim against the defendant was obviously unstainable and ought to be struck out (see paras 19–21).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan ('lampiran 5') di bawah A 18 k 19(a) Kaedah-Kaedah Mahkamah 2012 ('Kaedah-Kaedah') untuk membatalkan saman writ dan penyataan tuntutan plaintif-plaintif. Plaintif-plaintif

merupakan suami isteri yang mengusahakan perniagaan restoran mereka di bangunan sambungan berukuran 2,160 kaki persegi yang dibina dengan kos dan perbelanjaan mereka sendiri sebagai sambungan kepada kantin sedia ada yang dimiliki oleh defendan di atas tanah di bawah Lot 12741, GM 1696, Mukim 15, Daerah Wellesley Central, Penang. Bangunan sambungan tersebut telah dibina dengan kebenaran defendan dan plaintif-plaintif telah membayar sebanyak RM4,000 sejak 16 Jun 2010 sebagai sewa bulanan. Setelah bangunan sambungan tersebut siap dibina, defendan enggan untuk menandatangani perjanjian penyewaan bertulis bersama plaintif-plaintif untuk sewa tersebut. Defendan telah mengisukan notis niat untuk menamatkan penyewaan bangunan sambungan tersebut berkuatkuasa dari 31 Disember 2018. Defendan telah memulakan saman terhadap plaintif pertama di mahkamah sesyen melalui Saman No A52NCC-75–06 Tahun 2016 dengan menuntut, antara lain, milikan kosong bangunan sambungan dan kantin tersebut. Mahkamah sesyen telah membenarkan tuntutan defendan dan menolak tuntutan balas plaintif-plaintif. Rayuan plantif pertama telah ditolak oleh Mahkamah Tinggi. Pada 7 Februari 2018, plaintif pertama kemudiannya memfailkan notis untuk menarik balik rayuan tersebut. Dalam tindakan ini, plaintif-plaintif telah memplidkan bahawa: (a) bangunan sambungan tersebut telah dibina dengan kebenaran defendan yang telah membuat representasi bahawa plaintif-plaintif boleh meneruskan penyewaan bangunan sambungan tersebut untuk tempoh masa selama 25 tahun sehingga tahun 2025 namun defendan telah memungkiri janjinya; (b) bangunan sambungan tersebut telah menaikkan nilai tanah defendan, iaitu telah dinilai pada harga RM 1.4 juta oleh jurunilai yang berlesen; (c) oleh itu, defendan sepatutnya tidak dibenarkan untuk memperkayaan dirinya dan seharusnya membayar semula kepada plaintif-plaintif jumlah yang sama dengan nilai bangunan sambungan tersebut. Defendan berhujah bahawa tindakan ini oleh plaintif-plaintif adalah tidak boleh diterima menggunakan prinsip res judicata kerana tuntutan plaintif-plaintif adalah berdasarkan fakta dan isu yang telah diputuskan oleh mahkamah sesyen dan Mahkamah Tinggi. Plaintif-plaintif berhujah bahawa defendan adalah Bishop Titular Roman Katolik dan bukanlah deponen kepada afidavit. Plaintif-plaintif seterusnya berhujah bahawa tuntutan ini adalah untuk kehilangan hak dan kepentingan di dalam bangunan sambungan tersebut pada nilai masa kini dan kausa tindakan berkenaan dengn isu perkayaan tidak patut di bawah s 71 Akta Kontrak 1950 dan ia tidak termasuk isu untuk tindakan sebelum ini.

Diputuskan, membenarkan permohonan defendan dengan kos sebanyak RM3,000 tertakluk kepada alokatur:

(1) Right Reverend Sebastian Francis a/l MJ Francis, adalah mengikut undang-undang pengganti kepada Right Reverend Monseigneur Francis Chan, yang mewakili defendan sebagai badan korporat. Seksyen 4 Akta Bishop Roman Catholic (Pemerbadanan) 1957, adalah terpakai kepada

defendan sebagai badan korporat dan persona undang-undang sebagai sebuah badan berkorporat. Oleh itu, defendan mestilah menjadi deponen yang betul kepada afidavit yang difailkan oleh defendan. Hujahan-hujahan oleh plaintif-plaintif adalah jelas tanpa merit dan telah dibuat tanpa mempedulikan sepenuhnya terhadap undang-undang berkaitan dengan perbadanan (lihat perenggan 13).

(2) Telah didapati bahawa tindakan ini adalah berdasarkan fakta-fakta yang sama seperti tindakan sebelum ini di mana keputusan berdasarkan merit telah dibuat oleh mahkamah sesyen dan dipersetujui oleh Mahkamah Tinggi. Plaintif pertama, semasa tindakan sebelum ini, telah memberhentikan rayuannya terhadap Mahkamah Rayuan yang dapat dibuktikan melalui notis penarikan rayuan. Di dalam konteks tersebut, ia mestilah dianggap bahawa tindakan sebelum ini telah diselesaikan dengan muktamad (lihat perenggan 17).

(3) Tuntutan plaintif-plaintif di dalam permohonan ini adalah berkaitan dengan isu-isu yang telah diputuskan dengan merit yang berkaitan di dalam tuntutan sebelum ini. Mahkamah Tinggi, dalam mempersetujui keputusan mahkamah sesyen di dalam tindakan sebelum ini telah menyatakan kekayaan yang tidak sepatutnya adalah bukan sebahagian daripada isu-isu untuk dibicarakan. Namun, doktrin res judicata diguna pakai untuk keseluruhan isu-isu yang sepatutnya menjadi perkara litigasi di antara pihak-pihak di dalam tindakan sebelum ini. Tindakan plaintif-plaintif adalah dengan jelas dilarang oleh res judicata dan tuntutan plaintif-plaintif terhadap defendan adalah dengan jelas tidak boleh diterima dan sepatutnya ditolak (lihat perenggan 19–21).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783 ; [1995] 1 MLRA 611; [1995] 3 AMR 2559, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 2 AMR 1969, SC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1; [2016] 2 MLRA 263; [2016] 2 AMR 795, FC (refd)

Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor [2019] 2 MLJ 689; [2019] 3 CLJ 157; [2019] 2 MLRA 171; [2019] 2 AMR 492, FC (refd)

Tang Hooi Kheng v Titular Roman Catholic Bishop of Penang [2018] MLJU 268; [2018] 1 LNS 233; [2018] MLRHU 183; [2018] AMEJ 206, HC (refd)

Legislation referred to

Contracts Act 1950 s 71
Roman Catholic Bishops (Incorporation) Act 1957 s 4
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d), O 33 r 3

John Heah Wee Theng (Alan Lim Wei Lun with him) (John Heah & Co) for the plaintiff.
Ku Abdul Rahman bin Ku Ismail (Mirzawati & Assoc) for the defendant.

Ahmad Shahrir JC:

INTRODUCTION

[1] This is an application by the defendant (encl 5) under O 18 r 19(1)(a), (b) and/or (d) of the Rules of Court 2012 to strike out the plaintiff's writ of summons and statement of claim on grounds that:

(a) it does not disclose a reasonable cause of action;

(b) it is scandalous, frivolous or vexatious; and/or

(c) it is an abuse of the process of the court.

[2] The affidavits filed for and against the application are as follows:

(a) 'Afidavit Sokongan' affirmed on 4 January 2019 by the Rt Rev Sebastian Francis a/l MJ Francis (encl 6) for the defendant;

(b) 'Afidavit Balasan' affirmed on 4 February 2019 by Uh Chow Hung (encl 7) for the plaintiffs; and

(c) 'Afidavit Balasan' affirmed on 18 February 2019 by the Rt Rev Sebastian Francis a/l MJ Francis (encl 8) for the defendant.

BRIEF FACTUAL MATRIX

[3] The plaintiffs are husband and wife. At the material time, they were operators of a restaurant business. The plaintiffs operated their restaurant business at an annexe building measuring 2,160 sqft built at their own cost and expense as an extension to an existing canteen owned by the defendant on a piece of land held under Lot 12741, GM 1696, Mukim 15, Province Wellesley Central, Penang. The plaintiffs expected to rent the annexe building from the defendant for 15 years from 16 June 2010–31 December 2025. The defendant is the registered proprietor of the land. The annexe building was built with the consent of the defendant and the plaintiffs paid a monthly rental of RM4,000 for it since 16 June 2010.

THE EARLIER ACTION—SUMMONS NO A52NCC-75–06 OF 2016

[4] After the annexe building was completed, the defendant refused to execute a written tenancy agreement with the plaintiffs for its rental. The defendant later issued a notice dated 20 May 2014 of its intention to terminate the tenancy of the annexe building with effect from 31 December 2018. On 9 June 2016, the defendant commenced an action against the first plaintiff at the Sessions Court, Butterworth vide Summons No A52NCC-75–06 of 2016 claiming for the following reliefs (the parties in Summons No A52NCC-75–06 of 2016 are referred to in the manner they are referred to in the present application):

(a) delivery of vacant possession of the annexe building and the canteen;

(b) mesne profit in the sum of RM8,000 per month commencing from the month of January 2016 until the month of May 2016 amounting to RM40,000;

(c) interest at the rate of 5%pa on the sum of RM40,000 from the date of the writ of summons and statement of claim until full realisation;

(d) mesne profit in the sum of RM8,000 per month commencing from the month of June 2016 until delivery of vacant possession of the annexe and the canteen;

(e) cost; and

(f) other reliefs.

In that suit, the first plaintiff filed its defence and counterclaim. In her counterclaim, the first plaintiff counterclaimed for the following reliefs:

(a) a declaration that the first plaintiff had expended money on the defendant's land to build the annexe building relying on the defendant's assurance and representation;

(b) a declaration that there existed a concluded contract between the defendant and the first plaintiff that the first plaintiff would be allowed to continually rent the annexe building and the canteen for the period of 15 years commencing from 16 June 2010;

(c) a declaration that the defendant be estopped from issuing to the first plaintiff a notice to quit because there is a tenancy coupled with equity and/or an equitable estoppel;

(d) an order for specific performance of the oral agreement between the defendant and the first plaintiff pertaining to the tenancy of the annexe building and the canteen for the period of 15 years commencing from 16 June 2010 under the standard terms;

(e) for the defendant to give to the appropriate authority its approval for the building plans in respect of the annexe building built as an extension to the existing canteen which was erected with the consent of the defendant at the first plaintiff's own cost and expense;

(f) general damages additional to and/or as an alternative to specific performance and for damages to be assessed;

(g) cost; and

(h) further or other relief as the honourable court deems fit.

[5] At the conclusion of that trial, the learned sessions court judge allowed the defendant's claim and dismissed the first plaintiff's counterclaim. In that regard, the findings made by the learned sessions court judge may, inter alia, be summarised as follows:

(a) the defendant has proved that it is the owner of the land upon which the canteen and the annexe building were built. The annexe building was built with the tacit approval and knowledge of the defendant and by virtue of that fact, there was a tenancy coupled with equity and the defendant is bound by it; and

(b) the first plaintiff has been in occupation of the canteen and the annexe building since the year 2000 at a rental which has not been increased since the year 2003. The last tenancy agreement expired in the year 2010 and the notice to quit was served in the year 2015. Rental has not been paid since December 2015. The equity created is best satisfied by allowing the first plaintiff to occupy the canteen and the annexe building as tenants for a further period of three years with effect from 1 January 2016–31 December 2018 which is the maximum period granted by the National Land Code for a tenancy without registration. At the expiry of the said three-year period, the first plaintiff is to deliver vacant possession of the canteen and the annexe building to the defendant forthwith.

[6] The first plaintiff appealed against the decision of the learned sessions court judge in Summons No A52NCC-75–06 of 2016. The appeal was heard as Civil Appeal No PA-12B-37–08 of 2017 (see *Tang Hooi Kheng v Titular Roman Catholic Bishop of Penang* [2018] MLJU 268; [2018] 1 LNS 233; [2018] MLRHU 183; [2018] AMEJ 206) before His Lordship Justice Lim Chong Fong. In dismissing the first plaintiff's appeal, His Lordship Justice Lim Chong Fong made, inter alia, the following findings as found in the unreported publication:

> 28. Thirdly, the appellant submitted that the learned sessions court judge failed to take into account the fact that the appellant was allowed a further tenancy of 15 years after the construction of the annex building. This has been adequately dealt

with by the learned sessions court judge in para 37–58 particularly para 56 of her grounds. She primarily found the appellant failed to prove that Fr Stephen Liew agreed to allow the appellant to rent the canteen and the annex building for another 15 years.

29. Fourthly, the appellant submitted that the learned sessions court judge failed to consider that the respondent derived unjust enrichment from the annex building. As submitted by the respondent, the issue of unjust enrichment wasn't an issue to be tried. Nonetheless I am of the view that the learned sessions court judge was mindful of the same when she found that the appellant's tenancy was one coupled with equity in para 58 of her grounds.

30. Fifthly, the appellant submitted that the learned sessions court judge wrongfully ordered the appellant to deliver vacant possession of the annex building that was constructed wholly at the appellant's expense. In this regard, I reiterate that the learned sessions court judge was mindful of it and addressed it by holding that the equity is best satisfied if the appellant is allowed to occupy the canteen and annex building for a further three years from 2016 till 31 December 2018 at the same monthly rental of RM4,000 in para 61 of her grounds. In any event, I recognise that the law of fixture still applies and the equity in the annex building cannot result in the transfer of the ownership of that building to the appellant.

31. ...

32. ...

33. Eighthly, the appellant submitted that the learned sessions court judge only ordered that the appellant be allowed to continue with the tenancy for a term of three years only. The learned sessions court judge in fact found that the appellant had been in occupation of the canteen and subsequently the annex building for a total of 18 years. She stated as a matter of law in para 61 of her grounds that the National Land Code only allows for tenancy exempt from registration for only three years. In view of the termination of the tenancy, I am of the opinion that the further three years ordered in discharge of the respondent's equity is fair and reasonable in the circumstances.

34. Ninthly, the appellant submitted that the learned sessions court judge failed to consider that the appellant would suffer losses in expenses if she was not allowed to continue with the tenancy for a term of 15 years as agreed by the respondent. In this regard, I reiterate para 28 above. The appellant cannot therefore expect to recover the losses if the alleged agreement of 15 years tenancy could not be proved by her as found by the learned sessions court judge.

[7] Later on 7 February 2018, the first plaintiff appealed to the Court of Appeal against the decision of the High Court. However, on 16 July 2018, the first plaintiff filed a notice to withdraw the appeal.

THE PRESENT ACTION

[8] In the present action, the plaintiffs plead that the annexe building was built with the consent of the defendant to cater for the increasing needs of the plaintiffs' customers and that the defendant had made representations that the plaintiffs could continue to rent the annexe building for a further period of 25 years up to end of the year 2025 but the defendant later reneged on its promise. The plaintiffs have expended the sum of RM1m in constructing the annexe building purportedly relying on the representations made by the defendant in respect of the agreed tenancy and the plaintiff's rights are protected under the equitable principle of proprietary estoppel and s 71 of the Contracts Act 1950. It is also the plaintiffs' case that the annexe building has enhanced the value of the defendant's land and the annexe building itself is valued by a licensed valuer at RM1.4m. As such, the defendant should not be allowed to unjustly enrich itself and must reimburse the plaintiffs for an amount equivalent to the value of the annexe building. The plaintiffs claim against the defendant for the following reliefs:

(a) that the plaintiffs be granted leave to commence the action against the defendant;

(b) that the defendant be ordered to pay to the plaintiffs the sum of RM1.4m based on the current valuation of a licensed valuer for loss of their rights and interest on the annexe building;

(c) interest at the rate of 5%pa of the sum of RM1.4m calculated from the date of judgment to the date of full realization;

(d) general damages for pain and emotional distress;

(e) cost; and

(f) further or other reliefs deemed fit by the honourable court.

BRIEF DELIBERATIONS

Contention of the defendant/applicant

[9] It is the contention of the defendant that the present action by the plaintiffs is not sustainable on the basis of res judicata because the plaintiffs' present claim is premised on exactly the same facts and issues which have already been decided by the learned sessions court judge in Summons No A52NCC-75–06 of 2016 and affirmed by the High Court in Civil Appeal No PA-12B-37–08 of 2017. The decision of the learned sessions court judge on those issues as affirmed by the High Court had then became final and the plaintiffs could not in the present action seek to re-ventilate the same issues before this court.

Contention of the plaintiffs/respondents

[10] As a preliminary point, learned counsel for the plaintiffs raises the issue of the affidavit in support (encl 6) of the application. Learned counsel for the plaintiffs contends that the defendant in the present action is the Titular Roman Catholic Bishop of Penang and not the deponent of the affidavit. However, at para 1 the deponent aver that he is the defendant. On this basis, learned counsel for the plaintiffs submit that the present application ought to be dismissed *in limine* as there is no affidavit affirmed by the defendant in support of the present application.

[11] On substantive arguments, learned counsel for the plaintiffs contends that the present action is different than that of Summons No A52NCC-75–06 of 2016 and as such the doctrine of res judicata has no application. According to learned counsel for the plaintiffs, the cause of action in Summons No A52NCC-75–06 of 2016 is based on the defendant's claim (in that suit) for vacant possession of the canteen and the annexe building pursuant to a tenancy which has been terminated vide the notice to quit dated 29 April 2014 whereas in the present action, the plaintiffs claim for loss of their rights and interest in the annexe building at the market value. Learned counsel for the plaintiffs contends that the plaintiffs' claim stems from a cause of action pertaining to the issue of unjust enrichment under s 71 of the Contracts Act 1950 and it was not an issue in the previous action.

ANALYSIS AND DECISION

[12] On the preliminary issue of whether the Right Reverend Sebastian Francis a/l MJ Francis as the deponent of the affidavit in support is in fact the defendant itself, it is necessary to refer to the relevant piece of legislation which incorporates the defendant to determine its corporate identity. The defendant is incorporated under the Roman Catholic Bishops (Incorporation) Act 1957 together with the Titular Roman Catholic Bishop of Malacca Johore and Kuala Lumpur and by virtue of s 4 of the Act, the Right Reverend and his successors in office is the body corporate.

Section 4 of the Roman Catholic Bishops (Incorporation) Act 1957 reads as follows:

> 4. Incorporation of the Roman Catholic Bishop of Penang
>
> (1) The Right Reverend Monseigneur Francis Chan the Titular Roman Catholic Bishop of Penang and his successors in office shall be a body corporate (hereinafter called 'the Penang Corporation') and shall for the purpose of this Act have the name of 'The Titular Roman Catholic Bishop of Penang' and by that name have perpetual succession and shall have and may use a corporate seal which may from time to time be broken, changed, altered and made anew as to the Penang Corporation deems fit.

A (2) The Penang Corporation may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may sell, convey, assign, surrender and yield up, mortgage, demise, re-assign, transfer or otherwise dispose of any movable or immovable property vested in it upon such terms as to such Corporation deems fit and may sue and be sued in respect of such property in any B Court.

[13] As the successor in office of the Right Reverend Monseigneur Francis Chan, the Right Reverend Sebastian Francis a/l MJ Francis is, by law, the defendant itself, namely the body corporate. Section 4 of the Act confers upon C him the corporate sole and the legal personality as the corporation. As such, he must be the rightful deponent of the affidavits filed for the defendant in the present application. With respect, the arguments of learned counsel for the plaintiffs on this score is clearly without merits and one which is made in complete disregard of the relevant incorporating statute.

D

[14] Turning to the substantive issue, in an application for striking out under O 18 r 19(1)(a), (b) and/or (d) of the Rules of Court 2012, the discretion of the courts to grant the relief sought for by the applicant is always guided by the principle in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp* E *Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 2 AMR 1969. The then Supreme Court in *Bandar Builder* observed that:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

F (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer on the face of it is 'obviously unsustainable';

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or G a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

H (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[15] In respect of the same principle, the Federal Court in the case of *Seruan* I *Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1; [2016] 2 MLRA 263; [2016] 2 AMR 795 placed added emphasis on the word 'obviously unsustainable' and observed as follows:

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar*

Builder is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

[16] The plaintiffs' claim in the present appeal is premised on their alleged rights in that they have constructed the annexe building based on representations made by the defendant that they could continue to rent the annexe building for a further period of 25 years up to end of the year 2025. Since they have expended money in the construction of the annexe building, the defendant should not be allowed to be unjustly enriched when the first plaintiff in the previous suit was ordered to deliver vacant possession of the annexe building to the defendant and the defendant must be made to reimburse the plaintiffs for an amount equivalent to the value of the annexe building as certified by the licensed valuer.

[17] I find that the present action is grounded on the same set of facts as that of the previous action whereby a decision on the merits has been made by the learned sessions court judge and affirmed by the High Court. Against these decisions, the first plaintiff in the previous action had discontinued her appeal to the Court of Appeal as evidenced by the notice to withdraw the appeal attached in the defendant's affidavit in support as exh 'G'. In this context, it must be taken that the previous action has been disposed of with finality.

[18] The meat of the argument advanced by the defendant in support of the present application is grounded on the application of the doctrine of res judicata. In the case of *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] MLJU 79; [2019] 3 CLJ 157; [2019] 2 MLRA 171; [2019] 2 AMR 492, the Federal Court illustrates the constituents of the principle of res judicata in the following observations:

A [34] Firstly, on the issue of res judicata, it is necessary to reiterate the elements which constitute res judicata. For this purpose we find the book Spencer Bower and Turner, *The Doctrine of Res Judicata*, 3rd Ed (1996) particularly useful. There the learned authors sets out at p 10, para 19 what is involved in the burden of showing res judicata which consist of six matters:

B (i) the decision was judicial in the relevant sense;

(ii) it was in fact pronounced;

(iii) the tribunal had jurisdiction over the parties and the subject matter;

C (iv) the decision was—(a) final, and (b) on the merits;

(v) it determined the same questions as that raised in the later question; and

(vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

D [35] The learned authors further stated that the determination must not be collateral to the decision and for this one has to look at the formal judgment or order. Where an express declaration as to any particular question or issue appears on the face of the record of a formal judgment or where from the judgment itself the actual grounds of the decision can be clearly ascertained, there is no necessity for

E further search.

[19] The full grounds of the learned sessions court judge in the previous action whereby the first plaintiff's claim was dismissed is attached as exhibit 'C' in the defendant's affidavit in support. Likewise, the decision of the High

F Court which affirms the decision of the sessions court is also attached as exh 'E' in the defendant's affidavit in support. I have had the opportunity to examine both decisions and I find that the plaintiffs' claim in the present action relates to issues which have been decided on their merits in the previous action. In affirming the decision of the learned sessions court judge in the previous action,

G His Lordship Justice Lim Ching Fong had dealt with the issue of unjust enrichment at para 29 of the judgment.

[20] I am also mindful that the High Court in affirming the decision of the learned sessions court judge in the previous action mentioned in the judgment

H that unjust enrichment was not part of the issues to be tried. However, the doctrine of res judicata applies to the whole issues which should be the subject matter of litigation between the parties and is not confined merely to the ones raised by the parties in the previous action. In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1

I MLRA 611; [1995] 3 AMR 2559, the then Supreme Court held, inter alia, that:

[2] The doctrine of res judicata is not confined to causes of action or issues which the court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being

brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

CONCLUSION

[21] In the circumstances of the present application, I find that the plaintiffs' present action is clearly barred by res judicata and to that end, the plaintiffs' claim against the defendant is obviously unsustainable and ought to be struck out. The plaintiffs ought not to be allowed to re-ventilate their case under the guise of unjust enrichment. I hereby allow the defendant's application with RM3,000 cost subject to allocator.

Defendant's application allowed with costs of RM3,000 subject to allocator.

Reported by Mohd Kamarul Anwar